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Supreme Court, U.S.
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No. _____

In The
Supreme Court Of The United States
October Term, 1994

DAVID WAYNE HOLLAND,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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76 pp

QUESTIONS PRESENTED FOR REVIEW

Did the Magistrate and district court commit error in not allowing this Petitioner discovery of government documents after the district court ordered an evidentiary hearing on the Petitioner's claim that he was a victim of selective prosecution. Also, the district court stated that such a prosecution as this was "unusual", and that the district court had not heard of another prosecution such as this since being on the bench since 1979. Each Circuit Court of Appeals has a different standard for which discovery is granted, therefore, this Court should settle the discrepancies among the Circuits.

The Eleventh Circuit Court of Appeals substituted its own facts for that of the District Court in finding that Petitioners' case was not a candidate for a downward departure from the otherwise applicable sentencing guideline range. See this court's decision in ***Amadeo v. Zant***, 486 U.S. 214 (1988), where this court stated that the Eleventh Circuit Court of Appeals did this exact same thing in that case.

Is the district court required to charge and instruct the jury in the prosecution of perjury under 18 U.S.C. § 1621, about the "two-witness rule"?

List Of All Parties To This Proceeding

Judges:

Magistrate John E. Dougherty
United States Magistrate For
The Northern District of Georgia

Orinda D. Evans, United States
District Judge, For The Northern
District of Georgia

Counsel For The Government:

Joe D. Whitley, United State
Attorney For the Northern District of
Georgia

Kent Alexander, United States
Attorney For the Northern District Of
Georgia

Robert F. Schroeder. Assistant
United State Attorney for the
Northern District Of Georgia

Counsel For Petitioner:

Michael R. Hauptman

Petitioner:

David Wayne Holland

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Reference To Opinions Delivered In The Courts Below

This Petition is brought as a result of the following decisions and opinions below:

1. The jury returned a verdict of guilty against this Petitioner on three (3) counts of perjury on March 13, 1992. This verdict was entered this same date.

2. Denial of Petitioner's Motion For Judgment of Acquittal was entered on April 28, 1992.

3. Judgment and Sentence was entered on June 6, 1993.

4. Notice of Appeal to the Eleventh Circuit Court of Appeals was filed in the District Court on June 11, 1992.

5. The opinion of the Eleventh Circuit Court of Appeals denying Petitioner's relief was filed May 24, 1994.

Petitioner's Suggestion Of Rehearing was denied on August 9, 1994.

Jurisdictional Statement

The Petitioner applies to this Court for Writ of Certiorari from the opinion of the Eleventh Circuit Court of Appeals final order denying Petitioner's Suggestion for Rehearing or Rehearing In Banc on August 9, 1994. Court of Appeals number 92-8596.

Jurisdiction to review the judgment of the District Court and the Eleventh Circuit Court of Appeals by Writ of Certiorari is conferred on the United States Supreme Court by 28 U.S.C. 1254 (1).

The Eleventh Circuit Court of Appeals had jurisdiction to consider this Appeal pursuant to 28 U.S.C. 1291, and Rule 4 of the Federal Rules of Appellate Procedure. This was a direct appeal from a conviction in the United States District Court for the Northern District of Georgia, Atlanta Division.

There is a split among the various circuit courts of appeals as to when a defendant, alleging that he is a victim of selective prosecution, may obtain discovery of governmental documents so as to prove his case. This court needs to set forth one standard for all courts to follow. See Supreme Court Rule 10.1 (a).

Statement Of The Case

(i) Course Of Proceedings And Disposition Below

This Petitioner was indicted in a six (6) count indictment alleging that Mr. Holland committed perjury in filing a false paupers affidavit and for allegedly testifying falsely in a post judgment collection deposition. Count Six of the indictment alleged that Mr. Holland attempted to obstruct justice by having a potential witness to give false testimony before the grand jury. This Count was dismissed prior to the trial of this case.

Mr. Holland filed numerous pre-trial motions in this case, however, the motion which is brought before this Court is Mr. Holland's motion to dismiss the indictment based on Selective Prosecution.

The Magistrate assigned to this case initially denied Mr. Holland's Motion for Discovery on the issue of selective prosecution [R1-35], however, Mr. Holland filed a timely objection to the magistrate's ruling to the district court. The district court remanded this matter back to the magistrate with orders that the magistrate conduct an evidentiary hearing on Petitioner's claim that he is a victim of selective prosecution. The district court in ordering this hearing stated in her order that a prosecution such as this prosecution was "unusual". [R2-51-2]

Prior to the evidentiary hearing taking place, Mr. Holland had numerous subpoenas served upon certain telephone companies requesting the telephone records of the United States Attorneys Office, the Federal Bureau of Investigation's Office, personal and business telephone

records of Morris Dees and the Southern Poverty Law Center and the telephone records of Brian Spears. Mr. Holland had alleged that the above-mentioned individuals were involved in a conspiracy to imprison Mr. Holland because all are opposed to Mr. Holland's racial and political views. In fact, the district court acknowledged that Mr. Holland's views are "unpopular, particularly with the federal government." [R6-103-26]

The United States Attorneys Office, the telephone companies, Messrs. Dees and Spears and the Federal Bureau of Investigation all filed Motions to Quash the subpoenas [R4-82] claiming that Mr. Holland had not made a prima facie showing of selective prosecution. Mr. Holland also requested that the Court order the United States Attorneys Office to produce to him, all memoranda that had been sent among the above-mentioned individuals. However, the magistrate quashed the subpoenas in their entirety except the magistrate did order the United States Attorney to produce, ***in camera*** all communications sent between the Southern Poverty Law Center, Morris Dees, the United States Attorneys Office and the Federal Bureau of Investigation. [R5-89- -] None of these documents were ever turned over to your Petitioner. The magistrate did, however, order Messrs. Dees, Spears, Schroeder (Assistant United States Attorney) and Oliver Halle, the case FBI agent to be present and testify at this hearing pursuant to the Petitioner's subpoenas. In essence, the magistrate allowed Mr. Holland no discovery whatsoever to prepare for his evidentiary hearing on the issue of selective prosecution. Further, the magistrate would not allow Mr. Holland to question any of the witnesses at this hearing about any conversations or documents sent between Messrs. Spears, Dees, Schroder or Halle subsequent to the

indictment being filed. The magistrate and the district court concluded that any invidious motive would have to be shown to have taken place prior to the indictment being filed. Neither the magistrate nor the district court supported their decision with any legal authority for this decision.

This Defendant, after the court refused to dismiss the Defendant's indictment proceeded to trial, ***pro se***, and was convicted on three (3) counts of perjury. The trial court dismissed Count 1 of the indictment and the Petitioner was found not guilty of Count four (4) of the indictment.

(ii) **Statement Of The Facts**

This Petitioner was indicted in a six (6) count indictment, however, prior to trial the Petitioner moved to have Count Six of the indictment dismissed. The Court granted this motion. [R6-104]. The Petitioner proceeded to trial ***pro se*** with the assistance of stand-by counsel.

Further, this Petitioner filed extensive motions requesting that the court dismiss this indictment based on selective and discriminatory prosecution. The magistrate refused to dismiss the indictment, [R1-35] on this basis, however, the Petitioner appealed this decision to the district court, and after considering this appeal, the district court remanded this matter back to the magistrate and ordered that an evidentiary hearing be had on the Petitioner's Motion To Dismiss on the grounds of selective prosecution.[R2-51]

The evidentiary hearing, lasting two (2) days, and being heard by the magistrate had to be ultimately decided by the district court because the magistrate that conducted

the evidentiary hearing became ill and could not prepare an order. However, your Petitioner objected to this and stated that the district court could not, merely by reading a paper record judge the credibility of the witnesses that testified. Based on Petitioners objection, the district court held another evidentiary hearing which consisted of two (2) witnesses -- these are the only credibility decisions that the district court made from the transcript of the evidentiary hearing. The court orally denied Petitioner's motion to dismiss after conducting this hearing. [R5-115]

This case proceeded to trial. After the close of the government's case, Petitioner made a motion for judgment of acquittal and stating that the government had not met its burden of proof as required under the two-witness rule. [R6-789] In response to this motion, the court stated, "I don't believe that's the law in federal court. Go ahead." [R6-789]

Further, after your Petitioner rested, he once again stated to the court that the government had not met its burden under the law of the "two-witness" rule. Again, the court rejected this motion and responded as follows:

> You know, I think at some time that was a rule in some court, but I'm not -- I have never heard of it recently. I think it may be a real old rule from the state law, but I don't think it has an application here.

[R6-1078]

The government concedes on its brief in the Eleventh Circuit Court of Appeals that the "two-witness"

rule "was a correct statement of law." Government's brief at 39.

The Court, prior to sentencing, notified that the parties that the court was considering granting a downward departure in this case because the court was of the belief that the Sentencing Commission, when formulating the Guidelines, did not adequately consider perjury committed in a post judgment collection deposition and in filing an alleged false pauper's affidavit. The Defendant, did, file extensive motions for a downward departure also.

At sentencing, the court sentenced your Petitioner to two years probation; 250 hours of community service; six months home confinement; and, $750.00 restitution.

(iii) **Standard Of Review**

Whether the magistrate in this matter was in error in not allowing your Petitioner discovery of government documents after the district court had ordered an evidentiary hearing on the issue of selective prosecution is reviewed under the abuse of discretion standard.

Whether the district court committed error in finding that Petitioner's case was "atypical", thereby making it a candidate for a downward departure is reviewed under the clearly erroneous standard of review. However, whether the district court applied the correct application of the guidelines is reviewed **de novo**.

Whether the district court committed error in failing to give a jury instruction on the "two-witness rule" is reviewed for plain error.

Summary Of The Argument

1. The Magistrate and the District Court committed legal error when they would not allow this Petitioner discovery of government documents after the district court had ordered an evidentiary hearing on the Petitioner's claim that he was a victim of selective prosecution, and further, the district court found that such a prosecution as this particular case was "unusual".

2. The district court made an informed decision that this case was not a "heartland" case and was "atypical" thereby making it a candidate for a downward departure. The Eleventh Circuit Court of Appeals stated that this case was not unusual even though the Court of Appeals nor the United States Attorneys Office has pointed to another prosecution similar to this case. The Court of Appeals committed error in reversing the district court on this issue.

3. Is the district court required to charge and instruct the jury on the "two-witness rule" in a prosecution for violating 18 U.S.C. § 1621 regardless of whether a party requested this instruction or not?

Statement Of The Issues

1. There Is No Set Standard Among The Different Circuit Courts Of Appeals What An Individual Must Meet Before He/She Is Granted Discovery Of Government Documents On A Claim Of Selective Prosecution.

2. Can The Court Of Appeals Substitute Its Finding For That Of The District Court

As To Whether A Particular Case Is Unusual And A Candidate For A Departure From The Sentencing Guidelines?

3. Is the trial court required to instruct the jury on the "two-witness rule" in prosecutions of violating 18 U.S.C. § 1621?

Reasons For Granting Writ Of Certiorari

Issue Number 1.

Of the Eleven Courts of Appeals across the country, there are nearly as many different standards one must meet before he/she is granted discovery of government documents in a claim of selective prosecution. This Court needs to set forth one standard a person must meet so that all of the Courts of Appeals will be uniform. See Rule 10.1 (a) of this Court.

Issue Number 2.

While the courts' of this country are still developing and improving the Sentencing Guidelines, can the Courts of Appeals substitute their finding for those of the District Court? Also, since the district court is in the front lines, which court; the district court or the court of appeals should determine when a case is unusual and a candidate for a downward departure?

Issue Number 3

Is the trial court required to instruct the jury on the "two-witness rule" in prosecutions of 18 U.S.C. § 1621?

Argument And Citation of Authority

ISSUE NUMBER 1.

How Much Proof Should A Person Be Required To Produce To The Court As To Whether Or Not He/She Has Been A Victim Of Selective Prosecution Before He/She Is Granted Discovery Of Government Documents?

Petitioner would first like to point out to this court the varying standards among the various Circuit Court of Appeals that an individual must meet before the court will allow the Defendant discovery of government documents on the issue of selective prosecution.

The First Circuit Court of Appeals does not require a defendant to present a ***prima facie*** case of selective prosecution in order to obtain discovery of government documents. ***United States v. Saade***, 652 F.2d 1126 (1st Cir. 1981);

The Second Circuit Court of Appeals requires some evidence tending to show the existence of the essential elements of the defense of selective prosecution, and that the documents in possession of the government would be probative of these elements. ***United States v. Berrios***, 501 F. 2d 1207, 1211-12 (2nd Cir. 1974); ***United States v. Fares***, 978 F. 2d 52, 59 (1992);

The Third Circuit Court of Appeals will not allow an evidentiary hearing on the issue of selective prosecution until the defendant makes a threshold showing of the essential elements. ***United States v. Torquato***, 602 F. 2d

564 (1979); to obtain government documents, the defendant bears the burden of proving that others similarly situated have not been prosecuted, and second, the defendant must show that the government is prosecuting the defendant on some unjustifiable standard. ***United States v. Schoolcraft***, 879 F. 2d 64 (3rd Cir. 1989);

The Fourth Circuit Court of Appeals requires that the defendant make a nonfrivolous showing of both elements of the selective prosecution test. ***United States v. Greenwood***, 796 F.2d 49 (4th Cir. 1986);

The Fifth Circuit Court of Appeals holds the defendant to a "heavy burden" to prevail on the issue of selective prosecution, however, to obtain discovery of government documents, the defendant is required to prove a ***prima facie*** proof of selective prosecution. ***United States v. Johnson***, 577 F.2d 1304 (5th Cir. 1978);

The Sixth Circuit Court of Appeals merely requires the Defendant to take his claim of selective prosecution past the "frivolous stage". ***United States v. Hazel***, 696 F. 2d 473, 475 (6th Cir. 1983);

The Seventh Circuit Court of Appeals does not require a defendant to make out a ***prima facie*** case of selective prosecution, the Seventh Circuit requires only that the defendant show a colorable basis to obtain discovery of government documents. ***United States v. Kerley***, 787 F. 2d 1147, 1150 (7th Cir. 1986);

The Eighth Circuit Court of Appeals requires the Defendant to make out a ***prima facie*** case of selective prosecution before the government will be required to

produce documents. ***United States v. Parham***, 16 F. 3d 844, 846 (8th Cir. 1994);

The Ninth Circuit Court of Appeals requires that a defendant present specific facts and not mere allegations which would establish a colorable basis for the existence of both discriminatory application of a law and discriminatory intent on the part of the government actors. ***United States v. Armstrong***, 14 F. 3d 1387, 1391 (9th Cir. 1994);

The Tenth Circuit Court of Appeals requires that a defendant make a ***prima facie*** showing of selective prosecution before he is entitled to government documents. ***United States v. Bennett***, 539 F. 2d 45, 54, (1976), ***cert denied***, 429 U.S. 925 (1976); and,

The Eleventh Circuit Court of Appeals also states that to prevail on the issue of selective prosecution and defendant must meet a heavy burden, however, to obtain government documents, the defendant must prove a ***prima facie*** showing of selective prosecution before the government will be required to produce documents. ***United States v. Silien***, 825 F. 2d 320, 322 (11th Cir. 1987).

Justice Thurgood Marshall, dissenting, in the case of ***Wayte v. United States***, 105 S. Ct. 1524, 1540 (1985), stated that to obtain discovery an individual must merely make a "nonfrivolousness" showing of selective prosecution. Justice Marshall also stated that "most of the relevant proof in selective prosecution cases will normally be in the Government's hands." ***Wayte*** at 1539. ***Cf. Poller v. Columbia Broadcasting System***, 368 U.S. 464, 473 (1962).

This Petitioner, prior to the trial of this case filed numerous motions to dismiss this indictment based on selective and discriminatory prosecution. These motions were filed by Petitioner's then attorney, and also, Petitioner filed many of these motions ***pro se***.

After the magistrate denied the Petitioner an evidentiary hearing on the claim of selective prosecution [R1-35], your Petitioner filed a timely objection with the district court, and along with this motion, the Petitioner attached an affidavit of Jerome Froelich, a former Assistant United States Attorney for the Northern District of Georgia. This affidavit stated that according to Mr. Froelich, that he, while employed as an Assistant United States Attorney he had never heard of the government prosecuting an individual for allegedly committing perjury in a post judgment collection deposition or in the filing of an alleged false pauper's affidavit. Based on this affidavit, and the district court stating that such a prosecution as this, in her own experience, is "unusual", ordered this matter back to the magistrate for an evidentiary hearing on the issue of selective prosecution. [R2-51]

The district court in your Petitioner's case stated that the Petitioner had met the first of the two prongs of the selective prosecution test [R6-104-16], however, the court stated that your Petitioner did not overcome the second prong of the test; your Petitioner did not show an invidious motive on part of the government. The court did, however, state that because of the Petitioner's first amendment activity, which was known to the prosecutor in this case, would "militate" in favor of your Petitioner, this would not satisfy the second prong of the selective prosecution test. On the other hand, the court did state that

"the court is skeptical that a complaint of multiple instances of perjury in a post-judgment deposition in an ordinary civil suit would be accepted for investigation, much less prosecution, in this district" had the defendant not been a member of the Ku Klux Klan. [R6-104-25] The court went even further and doubted that this case had come to be "in the totally clinical manner AUSA Schroeder describes, without any value judgments being made which relate to the Defendant's position as a Klan leader." [R6-104-25].

While the burden to prove selective prosecution is on the Defendant, after the Defendant raises a reasonable doubt about his prosecution, the government is required to come forth with evidence ... or otherwise explain why the Defendant is being singled out for prosecution. ***United States v. Falk***, 479 F.2d 616 (7th Cir. 1973).

After your Petitioner was indicted, he obtained a photo copy of his indictment that was apparently sent by way of facsimile machine to an unknown location one day before the Grand Jury voted on the indictment. In fact, at the top of this indictment, the facsimile print out showed the following:

"From US Atty. Atlanta 03/15/90 19:25 P.4" Meaning that on March 15, 1990 at 5:25 P.M., the United States Attorney's Office in Atlanta, Georgia sent a copy of your Petitioner's indictment to an unknown location. The second line on this photo-copied indictment said:
"03/16/90 19:20 404-526-5746 ATL. JOURNAL →→→ SO POV LAW CTR 001." This meaning that on March 16, 1990 at 5:20 P.M., someone at the ***Atlanta Journal*** faxed a copy of your Petitioner's indictment to the offices of the Southern Poverty Law Center -- the organization that

encouraged this prosecution and supplied the United States Attorney's Office with the necessary materials to get this prosecution started. When the prosecutor was confronted with this evidence at the Petitioner's evidentiary hearing, Mr. Schroeder stated: "I'm telling you it couldn't have been. I mean ..." [R6-148] The district court stated that "The markings on the top of the telefaxed indictment suggests that it was faxed to an unspecified recipient on March 15, 1990 and by the Atlanta Journal to the SPLC on March 16, 1990. [R6-104-148]

Your Petitioner subpoenaed the telephone records of the United States Attorneys Office, the phone records of the Southern Poverty Law Center, phone records for the homes of attorneys Morris S. Dees and Brian Spears and the home records of the Assistant United States Attorney and the case FBI Agent, Oliver Halle. Your Petitioner stated that he wanted these records to show a patter of phone calls between the parties, prior to the indictment being voted on. Normally, these phone records would not have been relevant, however, the Assistant United States Attorney had denied ever speaking to Mr. Dees prior to the indictment in this action being returned. But with the photo-copied indictment showing that Mr. Schroeder, or someone in the United States Attorneys Officer had sent this indictment to someone before being voted on, this evidence seriously questioned the truthfulness of Mr. Schroeder. The magistrate quashed these subpoenas knowing full well that telephone records are discoverable. ***Smith v. Maryland***, 442 U.S. 735, 743, 44 (1979); ***United States v. Williams***, 639 F.2d 1311, 1319 (5th Cir. Unit A 1981); ***United States v. Atchley***, 699 F.2d 1055, 1058 (11th Cir. 1983). "Telephone records are frequently and properly used as corroborating circumstantial evidence to establish the

existence of a conspiracy." ***United States v. Noble***, 754 F.2d 1324, 1329 (7th Cir. 1985); ***United States v. Regilio***, 669 F.2d 1169, 1175 (7th Cir. 1981), ***cert denied***, 457 U.S. 1133 (1982).

Also, attorney Dees and Spears moved to quash the subpoenas on the ground that the phone records would violate the attorney/client privilege by divulging the names of their clients. However, "the identity of a client is a matter not normally within the [attorney/client] privilege." ***Frank v. Tomlinson***, 351 F.2d 384 (5th Cir. 1975), ***cert denied***, 382 U.S. 1028 (1966). The court granted Dees, Spears, Schroeder, Halle and the Government's motion to quash the Petitioner's subpoenas. A criminal defendant has a right to every man's evidence, except those protected by constitutional, common law or statutory privilege. ***Branzburg v. Hayes***, 408 U.S. 665, 668 (1972). Nothing the Petitioner was seeking was protected. "In general, it appears that the test for granting discovery on a claim of selective prosecution is somewhat less stringent -- and certainly no more stringent -- that the test for granting an evidentiary hearing." ***Federov v. United States***, 600 A. 2d 370, 378 (D.C. App. 1991) "To obtain discovery and an evidentiary hearing on a selective prosecution claim, a defendant is not required to prove each element of the claim." ***Id***. at 377.

In this particular case, while the district court granted your Petitioner an evidentiary hearing on the selective prosecution issue, the court then would not allow the Petitioner any discovery whatsoever to proceed on this matter. It is now the duty of this Court to set forth one standard an individual must meet before he/she is entitled to discovery of government documents in a selective

prosecution case. In this case, the district court merely stated, in essence, to your Petitioner, the court is going to give you an evidentiary hearing, however, the court is not going to allow you to obtain the evidence you need to prove your claim. What's the need in granting a defendant an evidentiary hearing if the court is not going to allow the defendant any discovery? Again, as Justice Thurgood Marshall stated, "most of the relevant proof in selective prosecution cases will normally be in the Government's hands." ***Wayte v. United States***, 105 S. Ct. 1524 (Marshall, J. dissenting) at 1539.

It should be apparent to this court that this Petitioner, without the assistance of the court or the government, met the first prong of the selective prosecution test, and still, this Petitioner was denied his opportunity to the discovery of any government documents. If this Petitioner is not entitled to discovery on his issue of selective prosecution, then the courts' of this country should completely abandon the defense of selective prosecution, because if this is not a clear cut case of selective prosecution, then there never has been a case.

Issue Number 2

Which Court Should Determine Whether A Particular Case Is Unusual And A Candidate For A Downward Departure From The Sentencing Guidelines -- The Trial Court Or The Court Of Appeals?

After your Petitioner was convicted, he moved, ***pro se***, for the district court to grant a downward departure from the otherwise applicable Sentencing Guideline range

based on the unusual circumstances surrounding this case, but especially, because of what the Commentary to the perjury guideline, which says in part:

> **Background:** This section applies to perjury and subornation of perjury, ***generally*** prosecuted under the referenced statutes.

(Petitioner's Emphasis)

The Commentary to the guidelines reflects the type of conduct considered by the Sentencing Commission in formulating the relevant Guidelines. ***United States v. Skinner***, 946 F.2d 176, 179 (2nd Cir. 1991).

This Court recently determined that the Commentary to the Sentencing Guidelines are binding on the Courts' unless they violate some law. ***Stinson v. United States***, 113 S. Ct. 1913 (1993). The district court notified the parties of its intention to consider a downward departure in this case based on the court's belief that the offense level attached to the perjury Guideline was not based on consideration of cases involving perjury committed in civil proceedings. In other words, the sentencing court did not believe that perjury in a civil matter had been ***adequately considered***[1]/ by the Sentencing Commission when formulating the Guidelines. [R6-140].

"The statute does not restrict departures to situations where the Commission **did not consider** a factor, but

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[1]/ Petitioner would ask, how could the Sentencing Commission have adequately considered perjury in a post judgment collection deposition and in the filing of an alleged false pauper's affidavit if the government cannot produce one case similar to your Petitioner's case?

merely where the Commission failed to **adequately consider** a particular factor. Determining whether a factor received adequate consideration must be left to the discretion of the sentencing court." (Emphasis in Original) Judy Clarke, Gerald McFadden, ***Departures From The Guideline Range: Have We Missed The Boat, Or Has The Ship Sunk?***, 29 American Criminal Law Review, 919, 927 (1992). It is absolutely beyond belief how the Sentencing Commission could have ***adequately considered*** perjury committed in a post judgment collection deposition and in a paupers affidavit, when according to the government's attorney, Robert Schroeder, the government has never prosecuted another case such as this one.

The government appealed the court's sentence. It is important to note that the government, at the sentencing of this Petitioner, could not produce another case, similar to your Petitioner's case where the government has prosecuted another person under the sentencing guidelines (or before the Guidelines) before your Petitioner was prosecuted; therefore, it is your Petitioner's belief that prosecuting someone for allegedly committing perjury in a post judgment collection deposition or in the filing of an alleged false pauper's affidavit -- it would be safe to infer then, that this type of perjury is not ***generally*** prosecuted. The Court of Appeals stated that there was nothing about your Petitioner's case which was atypical or significantly different from other perjury prosecutions. Further, the Court of Appeals stated that perjury committed in a civil proceeding was just as serious as perjury committed in a criminal matter. ***United States v. Holland***, 22 F.3d 1040, 1047 (11th Cir. 1994).

During the sentencing of your Petitioner, the court stated the following:

> ...and as far as I know, there has never been another case in the Northern District of Georgia prosecuting someone for committing perjury actually in a civil proceeding of any kind, and certainly not in a post judgment collection deposition. That makes me believe that probably a case like this one doesn't occur very frequently, and, therefore, there would not have been much ***data from cases similar to Mr. Holland's that went into the Sentencing Commission's determination of what would be an average sentence for this kind*** -- for a perjury case. The notes in the book indicate that the average sentence imposed nationwide for perjury before the Guidelines was 10 months. Well, I just don't believe that came from cases involving perjury in a collection deposition. I just don't believe it.

[R6-1316]

The Eleventh Circuit Court of Appeals, normally, gives "due deference"[2]/ to the district court's informed judgments. ***United States v. Beard***, 960 F.2d 965, 969 (11th Cir. 1992) "[f]actors specifically found by the district court converge to constitute a unique mitigating

---

[2]/ Recently, the Court of Appeals for the Federal Circuit stated that the term "*due deference*" is meant to fall somewhere between *de novo* and "clearly erroneous." ***United States v. Kim***, (No. 93-3219) (D.C. App.) Decided May 20, 1994

circumstance" and, a "combination of two factors justifies departure." ***United States v. Pena***, 930 F.2d 1486, 1495 (10th Cir. 1991); ***United States v. Mogel***, 956 F.2d 1555, 1565 (11th Cir. 1992).

The Sentencing Commission also wanted the district courts' around this country to carve out a set of "heartland" type cases, however, the Commission also wanted the courts' to depart when they were confronted by a case, which would normally be bound by the Guidelines, but because of unusual circumstances, would ask that the court depart, and in so doing the Commission held:

> The Commission intends the sentencing courts to treat each guideline as carving out a "heartland," a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted ...[t]he Commission does not intend to limit the kinds of factors (**whether or not mentioned anywhere else in the Guidelines**) that could constitute grounds for departure in an unusual case. U.S.S.G. Chapter 1, Pt. A (4) (b), 1.6

(Petitioner's Emphasis)

Clearly, this case could in no way be considered a "heartland" case. And further, if the sentencing court feels that the sentence that the Guidelines calls for is

inappropriate, the Guidelines, in effect, require the courts to depart. Daniel J. Freed, ***Federal Sentencing In The Wake Of Guidelines: Unacceptable Limits On The Discretion Of Sentencers***, 101 Yale L. J. 1681, 1746 (1992); ***United States v. Concepcion***, 795 F. Supp. 1262, 1271 (E.D.N.Y. 1992), (Weinstein, J.). ("under federal sentencing provisions, courts must depart from Guidelines 'when prescribed sentence seems inappropriate'").

The district court also found authority to make a downward departure in this case under Section 5K2.0 of the United States Sentencing Guidelines which provide a basis for a downward departure in this matter, even if the Sentencing Commission considered perjury committed in the civil realm. This section states in part as follows:

> ***Any*** case may involve factors in addition to those identified that have not been given adequate consideration by the Commission. Presence of ***any*** such factor may warrant departure from the guidelines, under some circumstances, in the discretion of the sentencing court. Similarly, the court may depart from the guidelines, ***even though the reason for departure is taken into consideration in the guidelines***, if the court determines that, in light of unusual circumstances, the guideline level attached to the factor is inadequate.

U.S.S.G. § 5K2.0.

(Petitioner's Emphasis)

Therefore, this Section of the Sentencing Guidelines would allow for this Court to make a downward departure even if the Sentencing Commission considered perjury in a post judgment collection deposition and in the filing of an alleged false paupers affidavit if this court concluded that the guideline section, 2J1.3, and the sentencing level is inadequate.

Also, Congress has provided the Courts' with statutory authority to grant departure from an unusual case:

> Under 18 U.S.C. § 3553 (b) the sentencing court may impose a sentence outside the range established by the applicable guideline, ***if the court*** finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines.

18 U.S.C. § 3553 (b); ***Mistretta v. United States***, 109 S. Ct. 647, 652 (1989).

Who is to decide whether the Sentencing Commission ***adequately considered*** a particular guideline -- the sentencing court or the court of appeals? It is the district courts that are in the front lines sentencing flesh and blood defendants. The dynamics of the situation will be difficult to gauge from the antiseptic nature of a sterile paper record. Therefore, appellate review must occur with full awareness of, and respect for, the triers superior feel for the case. ***United States v. Diaz-Villafane***, 874 F.2d 43, 49-50 (1st Cir.), ***cert denied***, 493 U.S. 862 (1989). ***See Also***, ***United States v. Rivera***, 994 F.2d 942 (1st Cir. 1993),

(Breyer, J.) "Ultimately, however, the Guidelines cannot dictate how courts should sentence in such special, unusual or other than ordinary circumstances. And, that is as it should be." at 949. Judge Breyer went on to say that "an appeals court must allow the district court a degree of 'leeway.'" at 950

Justice Breyer was on point in the ***Rivera*** case, and his point is applicable in this matter. Justice Breyer said that an appellate court must "respect" the district courts when they are determining what will or will not make a certain case "unusual" or "not ordinary." at 952, adding that the this very court has held that "it is not the role of the appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence. ***Williams v. United States***, _____ U.S. _____, 112 S. Ct. 1112 at 1121 (1992), quoting, ***Solem v. Helm***, 463 U.S. 277, 290 n.16 (1983).

The district court, in this matter, stated that in more than 10 years on the bench, she had never heard of another person being prosecuted for allegedly committing perjury in a civil matter, [R6-104-16], therefore, according to the Eleventh Circuit's prior rulings, "A departure may be appropriate if the conduct in question falls outside of the 'heartland' of typical conduct described by each of the guidelines." ***United States v. Chotas***, 968 F.2d 1193, 1195 (11th Cir. 1992).

This court has, on an earlier occasion slapped the hands of the Eleventh Circuit for doing exactly what they have done in this case, substituting their own facts for those of the district court -- the factfinder.

In the case of ***Amadeo v. Zant***, 108 S. Ct. 1771 (1988), this Court reversed the Eleventh Circuit Court of Appeals, and in so doing, the Supreme Court stated that:

> Without examining the record or discussing its obligations under Rule 52 (a), the court [referring to the ~~Eleventh~~ Circuit] *simply expressed disagreement and substituted its own factual findings for those of the district court.*
>
> * * *
>
> Even assuming, somewhat generously, that the Court of Appeals recognized and applied the appropriate standard of review, we cannot agree that the District Court's factual findings were clearly erroneous. [I]ts failure to defer to the District Court's findings in light of this recognition is difficult to fathom.

at 1777 & 1779. (Petitioner's Emphasis)

Certain examples of how the Court of Appeals substituted its own facts for that of the district court are:

The Trial Court: The assets in question were a boat and a car, and, I believe Mr. Holland's fence business. None of these assets *have substantial value*. [R6-1297]

Appeals Court: Holland [ ] owned *substantial* assets.

22 F.3d at 1042

(Petitioner's Emphasis)

The Trial Court: "Given that ruling on the Court's part, *the Court will dismiss count one*." [R6-809]

Appeals Court: "*The Government dismissed count one of the indictment at the close of its case-in-chief*."
(Petitioner's Emphasis)

22 F.3d at 1044.

The Trial Court: "Now, that brings us to the Defendant's Motion for a downward departure." [R6-1309]

Appeals Court: "Acting *sua sponte*, the court announced that it would give Holland a 'downward departure.'"
22 F.3d at 1044.

The Trial Court: "...Because during the deposition Mr. Holland *did tell Mr. Spears that he had transferred these assets which, in fact, Mr. Holland had done*. [R6-1296]

Appeals Court: Additional witnesses testified that Holland and three others orchestrated an elaborate scheme designed to *hide the fact that Holland owned a boat*.
22 F.3d at 1044.
(Petitioner's Emphasis)

One United States Judge has even questioned were the judges on the Eleventh Circuit Court of Appeals "reasonable men" ***In Re Acker***, 696 F. Supp. 591, 595

(N.D. Ala. 1988), when they removed him from hearing cases involving the Ku Klux Klan or Morris Dees and the Southern Poverty Law Center *(the individuals responsible for recommending this prosecution) sua sponte*. The Honorable William Acker stated in this opinion that this court "should have reassigned ***Amadeo*** [v. Zant] to another Court of Appeals because of the 'adamance' and "intransigence' of the Eleventh Circuit in avoiding its obligation to follow clear supreme Court precedent." 696 F. Supp. at 596-96.

These are just a few of the examples in this case where the Court of Appeals, simply disagreed with the facts as they were found by the district court and merely replaced those facts with the facts of their own -- completely ignoring the findings of the factfinder.

Your Petitioner, as ***Amadeo***, requests this court to once again order the Eleventh Circuit Court of Appeals not to substitute their findings for the findings of the factfinder, i.e., the district court, merely because the court of appeals may disagree with the district court. It is the district court -- the court that is in the front lines that can be the sole decision maker as to whether or not a case is unusual, and therefore, a candidate for a departure from the Sentencing Guidelines.

Issue Number 3.

Is The Trial Court Required To Charge And Instruct The Jury On The "Two-Witness Rule" In Prosecutions Of 18 U.S.C. § 1621 Whether It Is Requested Or Not?

Your Petitioner in this action did not request the court, either in writing or orally to charge and instruct the jury on the "two-witness rule." However, on two (2) separate occasions, your Petitioner did ask that the court grant your Petitioner a directed verdict of acquittal because the government had not met its burden as required under the "two-witness rule." Even if this Petitioner did not request a jury instruction on the "two-witness" rule, the court was obligated to instruct the jury on this matter since this is an essential defense to this form of perjury. "A defendant charged with a serious crime has the right to have a jury determine his guilt or innocence, *Duncan v. Louisiana*, 391 U.S. 145 (1968), and a jury's verdict cannot stand if the instructions provided the jury do not require it to find each element of the crime under the proper standard of proof." *Sandstrom v. Montana*, 442 U.S. 510 (1979); *Cabana v. Bullock*, 106 S. Ct. 689 (1986). "A trial court has an obligation to instruct the jury on *all* essential elements of the crime charged, even though the defendant fails to request such an instruction." *United States v. Herzog*, 632 F.2d 469 (5th Cit. 1980)

Recently, the Seventh Circuit Court of Appeals reversed a perjury conviction based on the trial court's failure to instruct the jury on the "two-witness" rule[3]/ in a perjury prosecution under 18 U.S.C. § 1621. *United States v. Chaplin*, 25 F.3d 1373 (7th Cir 1994), relying on this court's decision in *Hammer v. United States*, 271 U.S. 620 (1926), and citing *United States v. Olano*, ___ U.S. ___, 113 S. Ct. 1770 (1993), as such a refusal, or neglecting to

---

[3]/ In Chaplin, neither party, the government nor the defendant requested an instruction on the "two witness rule", nor was there any objection made to the court about it instructions to the jury. See 25 F.3d 1373 at n.2.

give a jury instruction on the "two-witness" rule resulted in "plain error", thereby, "the defendant has amply demonstrated that the error must be considered 'plain'. In our view, the defendant has amply demonstrated that the error was prejudicial and that, with respect to the counts at issue, it affected his substantial rights." 25 F.3d 1373 at 1377 n.2.

At the close of the government's case, Petitioner requested that the court grant him a directed verdict of acquittal based on the requirements of the "two-witness rule", however, in response to this motion, the court stated "I don't believe that's the law in federal court. Go ahead." [R6-789] And again, after all the evidence was received, your Petitioner again requested that the court grant a directed verdict of acquittal because the government had failed to meet the requirements of the "two-witness rule." And again, the court stated:

> You know, I think at one time there was a rule in some court, but I'm not -- I have never heard of it recently. I think it may be a real old rule from the state law, but I don't think it has an application here.

[R6-1078]

The "two-witness rule" is, without a doubt applicable in federal prosecutions, and has been for many years. ***United States v. Hall***, 44 Fed. Reporter 864 (S.D. Ga. 1890). And this court stated very clearly in the case of ***Weiler v. United States***, 323 U.S. 606, 611 (1945), that "[T]he jury convicted without being instructed that more than the testimony of a single witness was required to

justify their verdict. This was no mere 'technical' error relating to the 'formalities and minutiae' of the trial." ***See Also***, ***Hammer v. United States***, 271 U.S. 620 (1926). The "two-witness rule" remains good law, as the government conceded as much in their brief in response to your Petitioner's brief in the Court of Appeals. See Government's brief at 39. In fact, the circuit in which this case took place had, on may occasions relied on the "two-witness rule." *See* ***United States v. Cuesta***, 597 F.2d 903 (5th Cir.), ***cert denied***, 444 U.S. 964 (1979); ***United States v. Edmondson***, 410 F.2d 670 (5th Cir.), ***cert denied***, 396 U.S. 966 (1969); ***United States v. DeLeon***, 474 F.2d 790 (5th Cir.), ***cert denied***, 414 U.S. 853 (1973); ***McWhorter v. United States***, 193 F.2d 982 (5th Cir. 1952); ***United States v. Laite***, 418 F.2d 575 (5th Cir. 1969); and, ***United States v. Forrest***, 623 F.2d 1107 (5th Cir.), ***cert denied***, 449 U.S. 924 (1980).

The Petitioner, readily concedes that he did not, while appearing ***pro se*** at the trial of this case formally request that the trial court instruct the jury on the "two-witness rule", however, after the close of the government's case, the Petitioner did put the court on notice as to what his defense would be. And the court is required, whether requested or not, to charge and instruct the jury on the theory of the defendant's defense, if that defense has a legal and evidentiary foundation. ***United States v. Silverman***, 745 F.2d 1386, 1399 (11th Cir. 1984). "A judge must instruct a jury on all aspects of a case in order for them to reach a fair and proper verdict." ***United States v. Leon***, 679 F.2d 534, 541 (5th Cir. 1982). The Eleventh Circuit Court of Appeals recently held that a trial court should help guide ***pro se*** litigants through the legal obstacle it has set up, and should not erect unnecessary procedural barriers

which many ***pro se*** litigants will have great difficulty surmounting. ***Kilgo v. Ricks***, 983 F.2d 189, 194 (11th Cir. 1993).

Conclusion

This case offers this Honorable Court an opportunity to set forth one standard for all Courts, State and Federal to follow as to when a person should be allowed discovery on a claim of selective prosecution. This Court should not allow government prosecutors to "selectively prosecute" individuals, and then, refuse to allow the Defendant an opportunity to discover govenment documents, documents that are essential to prove the defendant's claim of selective prosecution. This isssue is very important at this time because of all of the political activity across the country, and the government, via their prosecutors, are, on a regular basis, singling out individuals for prosecution merely because the government opposes a persons political and racial views.

For these and for all of the reasons heretofore set forth, it is requested that the Petition For Writ of Certiorari be granted.

Respectfully Submitted,

Michael R. Hauptman
(Counsel of Record)
Attorney For Petitioner
34 Peachtree Street, NW
Atlanta, Georgia 30303
(404) 525-4110

CERTIFICATE OF SERVICE

This is to certify that I have this day, postage prepaid, mailed a true copies of the foregoing Petition For Writ Of Certiorari to Robert F. Schroeder, Assistant United States Attorney, Richard B. Russell Bldg., 75Spring Street, Atlanta, Georgia, 30303, by placing same in the United States Mail.

This the _____ day of _____, 1994.

Michael R. Hauptman

A P P E N D I X

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Appendix A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA	:	
v.	:	Indictment
DAVID WAYNE HOLLAND	:	1:90-CR-98

COUNT ONE

1. On or about January 4, 1989, in the Northern District of Georgia, the defendant, DAVID WAYNE HOLLAND, in a statement made under the penalty of perjury, as permitted under Section 1746 of Title 28, United States Code, did willfully subscribe as true material matters which he did not believe to be true, that is to say:

2. On or about the date aforesaid the defendant did file a Motion to Proceed in Forma Paupers on his appeal of a civil verdict and judgment with the United States District Court for the Northern District of Georgia.

3. The defendant's statements relating to his ability to pay for the costs of prosecuting his appeal were material.

4. On or about the date alleged in paragraph one herein, with respect to the aforesaid material matters, the defendant made the following false statement in an affidavit accompanying his motion:

"I have not within the past twelve (12) months received any income from any business or

profession or in the form of rent, interest or dividends, or from any other source."

5. The aforesaid statement of the defendant, as he well knew and believed, was not true in that the defendant had received income within the twelve month prior to the signing of the aforesaid affidavit.

In violation of Title 18, United States Code, Section 1621 (2).

COUNT TWO

1. The Grand Jury hereby incorporates by reference and realleges each of the allegations contained in paragraphs 1 and 2 of Count One of this indictment.

2. The defendant's statements relating to his assets were material.

3. On or about January 4, 1989, with respect to the aforesaid material matters, the defendant made the following false statement in an affidavit accompanying his motion:

"I do not own any stocks, bonds, notes or automobiles, or anything else that is of any value."

4. The aforesaid statement of the defendant, as he well knew and believed, was not true in that the defendant did own an automobile and other things of value.

In violation of Title 18, United States Code, Section 1621 (2).

COUNT THREE

1. On or about July 6, 1989, in the Northern District of Georgia, the defendant, DAVID WAYNE

HOLLAND, having taken an oath before a competent person in a case in which the law of the United States authorized an oath to be administered, that he would depose and testify truthfully, did willfully and contrary to such oath state as true material matters which he did not believe to be true, that is to say:

2. On or about the date aforesaid, the defendant did testify in a deposition following a civil verdict and judgment in a case that was heard in the United States District Court for the Northern District of Georgia.

3. The defendant's assets, transfer of assets and ability to satisfy the judgment entered in the civil action were material matters.

4. On or about the date alleged in paragraph one herein, with respect to the aforesaid material matters, the defendant willfully made the following statements which he did not believe to be true [false declarations are underlined]:

Q: Well, do you own a boat?

A: No.

* * *

(page 115)

Q: This is a boat that you had owned; correct?

A: Did I what?

Q: The boat for which the trailer exists--

A: Yeah.

Q: -- is the boat in which you had an ownership interest; correct?

A: Um-hum.

Q: That-- what kind of boat is it?

A: Oh, I think it's a 15-foot Fiberglass boat.

Q: All right. Is it open--

A: Yeah.

Q: --or is it covered?

A: No, it's open.

Q: And it has an engine?

A: Yeah, 60 horsepower, 65 or something.

Q: All right, just a gas engine?

A: Yeah.

Q: And you sold it to who?

A: Avery.

Q: How long ago did you sell it to Avery?

A: About a year ago.

Q: And he paid you for it?

A: Um-hum.

Q: How much?

A: I don't remember. I imagine I've got something at the house, but I'm not sure.

Q: Okay. Was there a bill of sale in connection with that?

A: I think so.

Q: And did you transfer title with the state with respect to the boat?

A: I don't know whether he did or not, I just sold him the boat. I understand what you're saying, whether he put it in his name. I believe he did, I'm not sure.

* * *

(page 120)

Q: The boat is kept at Ken's Marine, correct?

A: I don't know, I don't know where Avery's got it. I've only been up there one time.

Q: You mean to be on the boat--

A: Yeah.

Q: --be on it in the last year, is that what you're saying?

A: Yeah. When Avery got that boat, he took it somewhere, and I've only been up there fishing with him one time.

In violation of Title 18, United States Code, Section 1621(1).

COUNT FOUR

1. The Grand Jury hereby incorporates by reference and realleges each of the allegations contained in paragraphs 1 through three of this indictment.

2. On or about July 6, 1989, with respect to the aforesaid material matters, the defendant willfully made the following statements which he did not believe to be true [false declarations are underlines]:

Q: Does she [referring to Amy Porter Smith] drive car that you used to own?

A: No, she doesn't drive it. I sold it to Avery too.

Q: I see, and what kind of car was that?

A: An '82 Buick Regal.

* * *

(Page 124)

Q: And after that time, you sold the car to Avery?

A: No--Avery, I needed some money a long time ago--

Q: Yeah.

A: --and I was flat, I was just broke, and so Avery agreed to buy the car, and I said, "would you mind letting Amy continue using it?" And I said, "Just keep it

quite," [sic] because they hate one another, and he said, "No, I don't mind."

* * *

(Page 125)

Q: How much money was lent to you for the car, I mean, in return for you -- well, what did Avery give you for the car?

A: I don't know. I've got the -- I've got some checks at the house where I've paid him some monies back-

Q: Oh, back for --

A: -- that he's loaned me over a period of time. He bought the car just outright from me.

Q: All right, and the purchase price you don't recall?

A: Huh-uh.

In violation of Title 18, United States Code, Section 1621(1).

COUNT FIVE

1. The Grand Jury hereby incorporates by reference and realleges each of the allegation contained in Paragraphs 1 through three of Count Three of this indictment.

2. On or about July 21, 1989, with respect to the aforesaid material matters, the defendant willfully made the following statements which he did not believe to be true [false declarations are underlined]:

Q: Check number 251 to Verla Starnes.

A: Uh-huh (affirmative).

Q: That's the amount, three thousand, five hundred dollars. Is that correct?

A: Uh-huh (affirmative)

Q: And that represents her payment from you for months October, November, December and January.

A: Uh-huh (affirmative).

Q: Of 1988.

A: Correct.

Q: How much did she work for you during that period of time?

A: She works every day or did then.

Q: You repaid her, didn't you?

A: I gave her that check for that work. The check is self-explanatory.

Q: Well, let me see if it is. You noted in the lower left-hand corner, and this is your handwriting, is it not?

A: Uh-huh (affirmative)

Q: Your handwriting then writes out the words: Work, and the abbreviations for October, November, December, January, correct?

A: Uh-huh (affirmative).

Q: This is in reference to the period of time October 1989, correct?

A: Correct.

Q: Through January 1989.

A: Correct.

Q: The date of the check is October sixth, 1988, correct?

A: Uh-huh (affirmative)

Q: You prepaid her then for her work in months October, November, December, and January, correct?

A: I gave her that much money, but I don't know if she worked all that time.

Q: Well, what records do you have that show what period of time she worked?

A: I don't have any records.

Q: Did she, in fact, work for you?

A: I don't know when she quit.

Q: Did she work for you in November of 1988?

A: I don't know. I don't know. My mother got to feeling better, and we didn't need her.

Q: Does that mean that she didn't work for you at all in 1988?

A: I don't know. I've answered the question. I don't know when she quit.

Q: She quit your employment.

A: She went to Florida with her husband?

Q: About when?

A: I don't know.

Q: You didn't owe her three thousand, five hundred dollars in October of 1988, did you?

A: I don't think I owed it to her.

Q: Why did you prepay her?

A: I think she needed some money, and I had it.

In violation of Title 18, United States Code, Section 1621(1).

COUNT SIX

Between in or about mid-December, 1989, and mid-January, 1990, in the Northern District of Georgia, in connection with a federal grand jury investigation in the Northern District of Georgia into alleged violations, by the defendant DAVID WAYNE HOLLAND, of Title 18, United States Code, Section 1621, the defendant did corruptly endeavor to influence, obstruct, and impede the due administration of justice, by attempting to have Verla

Starnes give materially false information regarding her receipt of a $3,500 check, in violation of Title 18, United States Code, Section 1503.

A_____BILL

_____
FOREPERSON

/s/
RIMANTAS A. RUKSTELE
UNITED STATES ATTORNEY

/s/
ROBERT F. SCHROEDER
ASSISTANT UNITED STATES ATTORNEY

UNITED STATES DISTRICT COURT
Northern District Of Georgia

UNITED STATES OF AMERICA, :

v. : 1:90-CR-98-ODE

DAVID WAYNE HOLLAND :

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The Defendant, DAVID WAYNE HOLLAND, appeared pro se, having waived counsel.

The defendant has been found not guilty on count(s) four and is discharged as to such counts(s).

The defendant was found guilty on count(s) two, three and five after a plea of not guilty. Accordingly, the defendant is adjudged guilty of such count(s), involving the following offense(s):

Title & Section	Nature Of Offense	Counts
18 USC 1621(2)	Perjury	Two
18 USC 1621(1)	Perjury	3&5

As pronounced on June 3, 1992, the defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentences is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $150.00 for count(s) two, three and five, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this Judgment are fully paid

Signed this 16 day of June, 1992.

_____

Orinda D. Evans
United States District Judge

PROBATION

The defendant is hereby placed on probation for a term of TWO (2) YEARS. Execution of this sentence shall be STAYED pending appeal.

While on probation, the defendant shall not commit any federal, state, or local crime; shall not illegally possess a controlled substance; shall comply with the standard conditions that have been adopted by this court (set forth below); and shall comply with the following additional conditions:

1. If this judgment imposes a fine, special assessment, costs or restitution obligation, it shall be a condition of probation that the defendant pay any such fine, assessment, costs and restitution on terms and conditions set by the Probation Office and after the period of home detention.

2. The defendant shall not own or possess a firearm or destructive device.

3. The defendant is to participate in the home confinement program for a period of SIX (6) MONTHS. During this time the defendant shall remain at his place of residence except for employment and other activities approved in advance by the Probation Office. The defendant shall maintain a telephone at his place of residence without "call forwarding", a modem, "caller ID", or a portable cordless telephone for the above period. The defendant shall pay the costs of home detention.

4. The defendant shall make a full and complete disclosure of his finances and submit to an audit of his financial documents at the request of the Probation Office.

5. The defendant shall perform 250 hours of community service under the direction of the Probation Office.

6. The defendant shall make not contact with the witness Verla Starnes, directly or through an agent for the purpose of intimidation of retaliating against her.

RESTITUTION AND FORFEITURE

RESTITUTION

The defendant shall make restitution to the following persons in the following amounts:

Name Of Payee	**Amount Of Restitution**
United States Of America	$760.00

Payments of restitution are to be made to the United States Attorney for transfer to the payee.

Restitution shall be paid on terms and conditions set by the Probation Office.

Any payment shall be divided proportionately among the payees named unless otherwise specified here:

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA : [Filed June 11, 1992]

versus : 1:90-CR-98-ODE

DAVID WAYNE HOLLAND :

NOTICE OF APPEAL

COMES NOW, the defendant, David Wayne Holland, and files this, his Notice of Appeal in the above-styled action, and appeals his conviction to the United States Court of Appeals for the Eleventh Circuit and says as follows:

1. This Defendant hereby files this Notice of Appeal and states that his grounds for appeals are as follows, but his appeal will not be limited to these grounds:

a. The District Court erred in not dismissing this indictment on the grounds that this Defendant was selectively prosecuted;

b. The District Court erred in not instructing the jury that under 18 U.S.C. § 1621, there had to be at least two (2) witnesses testimony to contradict the testimony of the defendant;

c. The trial court erred in not allowing this Defendant's stand-by counsel to sit at the defense table with the Defendant;

d. The trial court erred in not allowing this Defendant to discover government documents to present at his selective prosecution hearing;

e. The trial court erred in not granting this Defendant's Motion for Judgment of Acquittal;

f. The trial court erred in not granting this Defendant a new trial in this case; and,

g. The alleged perjurious statements of this Defendant were not material, therefore, said statements would not support a guilty verdict in this case.

This Defendant was found guilty by a jury on March 13, 1992.

Defendant filed a post judgment Motion of Acquittal, which was denied by the Honorable Orinda D. Evans on April 28, 1992. This Defendant filed a Motion For Reconsideration, this Motion was denied on May 22, 1992.

This Defendant's sentence was entered June 3, 1992 and this Notice of Appeals is hereby filed after the date of sentencing.

Respectfully Submitted,

_____/s/_____
Dave W. Holland, Pro Se

2657 Kings Way
Lawrenceville, GA. 30244
(404) 925-3245

CERTIFICATE OF SERVICE

This is to certify that I have hand delivered a copy of this Notice of Appeal to Robert Schroeder's Office which is located on the 18th Floor of the Richard B. Russell Building this 11th day of June, 1992.

_____/s/_____
Dave W. Holland

[May 24, 1994]

UNITED STATE COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
[To Be Published]

NO. 92-9596
Oral Argument Calendar

D.C. Docket No. 1:90-CR-98-ODE

UNITED STATES OF AMERICA
Plaintiff-Cross Appellant,

vs

DAVID WAYNE HOLLAND
Appellant-Cross Appellee.

On Appeal From A Conviction In The
Northern District Of Georgia, Atlanta Division

Before TJOFLAT, Chief Judge, BIRCH, Circuit Judge, and Bright*, Senior Judge.

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* Honorable Myron H. Bright, Senior U.S. Circuit Judge for the Eighth Circuit sitting by designation.

TJOFLAT, Chief Judge:

In this Appeal, David Wayne Holland challenges his convictions and sentences on three counts of perjury.[1] By cross-appeal, the Government contends that the sentences imposed by the district court fail to conform to the requirements of the Sentencing Reform Act of 1984, 18 U.S.C. §§ 3551-3586 (1988), and the guidelines promulgated thereunder. Specifically, the Government challenges the district court's rejection of the probation officer's recommendation that Holland's base offense levels be enhanced four levels to reflect his leadership role in the offenses, *see.* United States Sentencing Commission *Guidelines Manual* § 3B1.1 (Nov. 1, 1993), and the court's *sua sponte* refusal to apply the guideline governing perjury cases, U.S.S.G. § 2J1.3, based on the fact that Holland's perjury occurred during the course of civil, as opposed to criminal, proceedings.

After a thorough review of the record, we find no merit in any of Holland's claims of error.[2] The

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[1]/ Holland was convicted of two counts under 18 U.S.C. § 1621 (2) (1988) and one count under 18 U.S.C. 1621 (1) (1988). The two subsections are virtually identical, differing only as to the actual source of the perjury. Subsection one applies to knowingly false statements, given in either oral or written form, to a competent tribunal under oath; subsection two, on the other hand, applies to similar statements made in a written declaration that the author "subscribes as true" under penalty of perjury.

[2]/ Holland raises six claims on appeal. First, he argues that the district court erred in denying his motion to dismiss the indictment for selective prosecution, Holland's second and third claims assert error in the district court's disallowance of various requests for discovery. Fourth, Holland urges that the perjury charges should have been dismissed because his false statements were not material. In his final two claims, Holland argues that there was insufficient evidence on which to convict

Government's cross-appeal, however, is well taken; accordingly, we affirm Holland's convictions, and remand the case to the district court for resentencing.

I.

This perjury prosecution stems from statements Holland made in an effort to avoid satisfying a money judgment, in the sum of $450,000, entered against him on October 5, 1989, in the United States District Court in *Williams v. Southern White Knights, Knights of the Ku Klux Klan, Inc.*, Case No. 1:87-cv-565-CAM (N.D.Ga. 1987)[3]/ That judgment was entered on a finding that Holland and an organization he founded, Southern White Knights, Knights of the Ku Klux Klan, had conspired to deprive certain individuals of their civil rights in violation of 42 U.S.C. § 1985 (1988).

Holland appealed the *Williams* judgment. Thereafter, on January 4, 1989, Holland moved the district court for leave to prosecute his appeal *in forma paupers*. In the affidavit accompanying his motion, Holland stated that he did not "own any stocks, bonds, notes or automobiles,

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him and that the district court erred in failing to apply the two-witness rule (which provides that the uncorroborated testimony of one witness is not sufficient to prove the falsity of sworn testimony for perjury purposes). *See United States v. Edmondson*, 410 F.2d 670, 674 (5th Cir.), cert denied, 396 U.S. 966, 90 S. Ct. 444, 24 L.Ed.2d 430 (1969) As stated above, Holland's claims are meritless; thus, they warrant no discussion.

[3]/ The complaint in *Williams* alleged that the defendants conspired to deprive the plaintiffs of their civil rights during a January 17, 1987 civil rights march in honor of the birthday of Martin Luther King, Jr., and that, in furtherance of the conspiracy, the defendants aided and abetted various acts of harassment that occurred during the march, including the throwing of rocks and bottles.

or anything else that is of any value." The court relying upon Holland's affidavit, granted his motion.

Approximately seven months after the *Williams* judgment, the attorney for the plaintiffs, Morris Dees, retained another attorney, Brian Spears, to obtain satisfaction of that judgment from Holland. In order to determine Holland's finances, Spears took Holland's deposition in July of 1989. Dees had Holland's deposition transcribed and presented it, along with the pauper's affidavit Holland had submitted to the court in support of his motion for leave to proceed on appeal *in forma pauperis*, to the United States Attorney for the Northern District of Georgia; Dees wanted Holland indicted for perjury.

On March 15, 1990, a Northern District of Georgia grand jury indicted Holland on five counts of perjury and one count of obstruction of justice. Counts one and two of the indictment, brought under 18 U.S.C. § 1621 (2), alleged that the *in forma pauperis* affidavit Holland submitted to the district court in *Williams* contained false statements regarding his assets. Counts three, four and five, brought under 18 U.S.C. § 1621(1), charged Holland with making similar false statements in the post- judgment deposition in *Williams*.[4]/ Count six was brought under 18 U.S.C. § 1503 (1988) charged Holland with obstructing justice by encouraging a witness, Verla Mayo, to present false testimony to the grand jury investigating the case.

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[4]/ The false statements cited in the indictment were that Holland had not earned any income in the preceding twelve months (count one); owned nothing of value (count two); had sold his boat (count three); had sold his car (count four); and that a $3,500 check he wrote to Verla Mayo was a prepayment for services (count five).

Holland's case went to trial on counts one through five, on March 4, 1992.[5/] In its case -in- chief, the Government established that, contrary to the statements Holland had made in his *in forma pauperis* affidavit and his deposition, Holland at the time he made those statements, owned substantial assets, including a car, a boat, and a fence installation business. It also demonstrated that Holland testified falsely in order to prevent the *Williams* plaintiffs from satisfying their judgment. Holland was able to prevent the *Williams* from levying upon his assets by entering into a series of sham transactions with a number of individuals.

For example, Verla Mayo testified that, the day after the jury in *Williams* returned its verdict, Holland solicited her assistance in secreting his money, so that the *Williams* plaintiffs "would not get any [ ] of his [assets]." According to Mayo, Holland gave her a $3,500 check with instructions to cash it and return the full amount to him. Although the check stated that it constituted prepayment for work Mayo was to do for Holland, Mayo said that the check was merely an attempt to evade satisfying the *Williams* judgment. Thus, after cashing the check, Mayo returned the proceeds over to Holland.

Additional witnesses testified that Holland and three others orchestrated an elaborate scheme to hide the fact that Holland owned a boat. At Holland's direction, Bobby Starnes delivered Holland's boat to Edwin Pierce. Starnes then instructed Pierce, who had agreed with Holland to conceal the boat, to sign and backdate a $1,000 check to

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[5/] Prior to trial. the court dismissed count six for reasons not relevant here.

Holland to make it appear as if Pierce had purchased the boat. Because Pierce only had forty dollars in his bank account at the time, Holland provided Pierce with $1,000 in cash to cover the check. The $1,000 was part of the proceeds of the $3,500 check that Holland had Verla Mayo cash.

John Avery Coor helped Holland carry out his scheme by representing that, several months prior to the return of the *Williams* verdict, he had acquired Holland's business and his automobile. Holland, however, continued to own and operate the business himself. As for the car, the Government established that on two occasions after Holland supposedly sold the car to Coor, Holland attempted to transfer title to the car to two other individuals. Coor eventually took the title, but he did so only after the other individuals had refused to accept the case, and after the *Williams* judgment had been entered.

The Government dismissed count one of the indictment at the close of its case-in-chief. Holland defended the remaining counts by presenting witnesses who attempted to refute portions of the Government's case. On March 13, 1992, a jury found Holland guilty on counts two, three and five, and acquitted him on count four.

In the presentence report prepared by the court's probation office, Holland received, with respect to each offense of conviction, an adjusted offense level of 27 and a criminal history category of III. The probation office arrived at Holland's adjusted offense level by adding the following three enhancements to the perjury base offense level of 12: An eight level increase under U.S.S.G. § 2J1.3(b)(1) for causing or threaten to cause physical injury

to a person, Verla Mayo's son, in an effort to suborn Verla Mayo's perjury before the grand jury; a three level increase under U.S.S.G. § 2J1.3(b)(2) for perjury result in "substantial interference with the administration of justice;" and, a four level increase under U.S.S.G. § 3B1.1(a) for Holland's role in the offense as "an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive." These findings yielded a guideline sentence range that called for a period of imprisonment of 87 to 108 months.

At the sentencing hearing, however, the court, in determining the applicable sentence range, rejected the adjustments the probation office made to Holland's base offense levels. Specifically, the court rejected each of the probation office's three suggested enhancements.[6/] This would have left Holland with an adjusted offense level of 12 for each offense, but the court went further still. Acting *sua sponte*, the court announced that it would give Holland a "downward departure." Concluding that the guideline applied by the probation office, U.S.S.G. § 2J1.3, "Perjury of Subornation of Perjury," does not apply to perjury that occurs in a civil proceeding, the court lowered Holland's base offense level to 8, a level that the court felt was appropriate under the circumstances. Coupled with Holland's criminal history category of III, this offense level yielded a sentence range from 6 to 12 months imprisonment. The court then proceeded to sentence Holland, on each of counts two, three and five, to six

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[6/] Since the government does not appeal the district court's rejection of the enhancements for obstruction of justice and for threatening to cause physical injury in order to suborn perjury, we do not comment on the merits of those decisions.

months home detention, along with two years probation and 250 hours of community service.[7/]

The Government now appeals these sentences, raising two challenges. The Government contends that: (1) the district court erred in rejecting the probation office's recommendation that each of Holland's base offense levels be given a four level enhancement, under U.S.S.G. § 3B1.1(a), for his role in the offenses, and (2) the district court erred in concluding that guideline section 2J1.3 did not apply to perjury committed in civil cases. We consider each of these challenges in turn.

II.

A.

The district court's probation office recommended a four level enhancement of Holland's base offense levels under guideline 3B1.1, which provides for such adjustment when, "[based on [his] role in the offense[s], ... the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive." The court rejected this recommendation, finding instead that "in committing perjury ... [Holland] acted alone."

Although the district court's findings of fact are generally entitled to due deference and are reviewed under the clearly erroneous standard, *United States v. Carrillo*,

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[7/] In addition, the court required that Holland pay restitution in the amount of $761.50 as well as a special assessment of $150.00 to the United States of America. The court also barred Holland from possessing a firearm and ordered him fully to disclose his financial status and to submit to an audit by the probation office.

888 F.2d 117, 118 (11th Cir. 1989), we proceed *de novo* where, as here, the Government contends that the court improperly interpreted the applicable legal standard. *See United States v. Scroggins*, 880 F.2d 1204, 1205 n.5 (11th Cir. 1989), *cert denied*, 494 U.S. 1083, 110 S. Ct. 1816, 108 L.Ed. 2d 946 (1990).

Section 3B1.1(a) outlines two situations in which a defendant's leadership role merits a four level enhancement. First, enhancement is appropriate where the defendant plays a leadership role in criminal activity involving five or more participants. A "'participant' is a person who is criminally responsible for the commission of the offense, but need not have been convicted." U.S.S.G. § 3B1.1, comment. (n.1); *see also United States v. Markovic*, 911 F.2d 613, 616-17 & n.6 (11th Cir. 1990). Moreover, when determining the number of participants, the defendant is to be considered one of the five. *United States v. Rodriguez*, 981 F.2d 1199, 1200 (11th Cir.), *cert denied* ___ U.S. ___, 113 S. Ct. 2455, 124 L.Ed. 2d 671 (1993).

Second, even where the activity involves less that five participants, a section 3B1.1 (a) adjustment nonetheless will apply where the defendant plays a leadership role and the operation is "otherwise extensive." *Id.* Under the "otherwise extensive" standard, no set number of criminally responsible participants is required.[8/] Rather, "[i]n assessing whether an organization is 'otherwise extensive', all persons involved during the course of the entire offense are to be considered", including

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[8/] In order to demonstrate that the defendant occupied a leadership role under this standard, however, there must be at least one participant in addition to the defendant. *See Rodgers*, 951 F.2d at 1222.

outsiders who provide unknowing services. U.S.S.G. § 3B1.1, comment. (n. 3).

Guidelines 1B1.3 defines the relevant conduct to be considered in determining whether enhancement is appropriate under section 3B1.1. According to section 1B1.3, adjustments shall be determined on the basis of the following conduct:

> [A]ll acts and omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense, or that otherwise were in furtherance of that offense.

U.S.S.G. App. C, amend. 439 (Nov. 1, 1992) (providing text of guideline 1B1.3 governing Holland's sentence).[9/]

Thus, in determining whether to adjust the defendant's base offense levels under section 3B1.1, the court's inquiry is not confined solely to the defendant's behavior comprising the actual offense charged. Rather, the court is instructed to consider "all acts or omissions 'that were part of the same course of conduct or common scheme or plan as the offense of conviction.'" *United States v. Rodgers*, 951 F.2d 1220, 1222 (11th Cir.) (citation omitted), *modified in part*, 972 F.2d 1253 (1992). In other

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[9/] Although the subsequent amendments to guideline 1B1.3 do not have any substantive effect on the outcome of this case, we apply the version in effect on the date upon which the defendant was sentenced. June 3, 1992.

words, in deciding whether individuals were participants in the criminal activity, the court must consider, in addition to the criminal act itself, the individual's involvement in the events surrounding the criminal act.

In the present case, the district court failed to consider the events surrounding Holland's perjury in determining whether there were five or more participants in that perjury and whether Holland played a leadership role as to those participants. A trial, the evidence indicated that as many as five individuals - Verla Mayo, Bobby Starnes, John Avery Coor, Edwin Pierce, and Randall Smith - assisted Holland by imparting an air of legitimacy as to his perjurious statements. In fact, as the Government argued at sentencing, Holland may have never committed perjury absent the willingness of these individuals to engage in sham transactions and the secreting of Holland's assets.

In concluding that Holland acted alone, however, the district court failed to consider the assistance of these individuals in the circumstances surrounding Holland's perjury, and instead focused solely on his perjurious statements. That the district court mis-applied the guidelines is made clear by the court's comment at Holland's sentencing hearing:

> How do you deal with the fact that the convictions are for perjury, and on the occasions when Mr. Holland committed the perjury; specifically in the deposition and in the affidavit, he was acting on his own? In other words, he was not prosecuted for transferring his assets. You are correct that a lot of people were involved in the transfer of assets.

> I believe that in committing the perjury in the civil deposition and in the affidavit the defendant acted alone...

Because section 1B1.3 clearly contemplates a review of the relevant events that precede and follow the offense of conviction,[10/] the district court improperly limited its inquiry by focusing solely on the making of the false statements.

Moreover, regardless of whether there were five or more participants in Holland's criminal activity, the four level role in the offense enhancement nonetheless may be appropriate based on the "otherwise extensive" nature of Holland's criminal behavior. Although this circuit does not employ a precise definition for the "otherwise extensive" standard, there are a number of factors relevant to the extensiveness determination, including the length and scope of the criminal activity as well as the number of persons involved. *See Rodriguez*, 981 F.2d at 1200. In the present

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10/ The present case is clearly distinguishable from *Rodgers*, 951 F.2d at 1221-22, where this court determined that a role in the offense enhancement could not be based on conduct that did not comprise the crime of conviction. In *Rodgers*, we refused to permit a role in the offense enhancement where it was based on conduct that compromised other crimes that were dismissed as a result of the pleas bargain with the defendant, holding instead that a role in the offense enhancement was proper 'where [the defendant] acted alone in the offense for which he was convicted, even though he acted with others for the other charges against him." *Id.* at 1221-22. In the present case, however, we are not dealing with conduct contained in charges that were dismissed, but rather on conduct immediately concerning the crimes for which Holland was convicted. Accordingly, the relevant conduct to be considered included all of the events here in question.

case, the evidence adduced at trial indicated that Holland's perjurious activity continued over a period of three years and involved the assistance of several individuals at least. These facts raise a question, to be addressed by the district court on remand, as to whether Holland's criminal activity was "otherwise extensive."

B.

The final issue before us on appeal concerns the district court's *sua sponte* refusal to apply the guideline applicable to perjury cases based on the fact that Holland's perjury occurred in a civil case rather than in a criminal case. According to the district court, a "downward departure" was appropriate under these circumstances because the Sentencing Commission, in determining the base offense level for perjury, only considered perjury arising out of criminal proceedings. As such, the court concluded that perjury occurring in civil cases was not adequately considered by the Sentencing Commission is arriving at the base offense level for the crime.

Generally, a district court may nor depart from the guideline sentencing range "unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing commission in formulating the guidelines..." 18 U.S.C. § 3553(b) (1988). Whether the commission adequately considered a factor can be determined only through an examination of the guidelines, policy statements and official commentary. *Id.*

Moreover, in reviewing departures from the guideline sentencing range, this court employs a three-part analysis. Initially, we examine *de novo*, whether the

Sentencing Commission considered the factor relied upon by the district court. Second, if the factor was not considered by the Commission, we must decide whether consideration of the factor is consistent with the guidelines. Finally, if the factor is consistent with the guidelines, and the district court's application of that factor is not clearly erroneous, we must examine whether the extent of the district court's departure is reasonable. *United States v. Mogel*, 956 F.2d 1555, 1557 (11th Cir.), *cert denied*, ___ U. S. ___, 113 S. Ct. 167, 121 L. Ed.2d 115 (1992); *see also United States v. Valle*, 929 F.2d 629, 631 (11th Cir.), (per curiam), *cert denied*, ___ U.S. ___, 112 S. Ct. 401, 116 L.Ed.2d 350 (1991).

In the present case, we need only examine the first prong in order to recognize that the district court based its departure on an improper factor. The district court sought to differentiate Holland's conduct by demonstrating that Holland's perjury in a civil proceeding was an atypical situation falling outside the "heartland." According to the guidelines:

> The Commission intends the sentencing courts to treat each guideline as carving out a "heartland," a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guidelines linguistically applies but where the conduct significantly differs from the norm, the court may consider whether a departures warranted.

U.S.S.G. Ch. 1, Pt. A, § 4 (b), intro comment. In other words, "departure is reserved for 'unusual' cases where there is something atypical about the defendant or the

circumstances surrounding the commission of the crime..." *United States v. Gonzales-Lopez*, 911 F.2d 542, 549 (11th Cir. 1990), *cert denied*, 500 U.S. 933, 111 S. Ct. 2056, 114 L.Ed. 2d 461 (1991).

Neither Holland's conduct nor the circumstances surrounding his offense were atypical or significantly from the conduct to which the perjury statute normally applies. The mere fact that the vast majority of convictions under 18 U.S.C. § 1621 may involve perjury in a criminal proceeding does not affect our ruling. Holland engaged in the exact type of conduct that would form the basis for a perjury conviction in a criminal proceeding; he willfully made material statements under oath that he knew were false. Moreover, the fact that the perjury statute itself applies without distinction both to perjury committed in a civil proceeding and to perjury in a criminal prosecution reinforces our view that the circumstances of Holland's perjury do not merit a downward departure.

In so holding, we categorically reject any suggestion, implicit or otherwise, that perjury is somehow less serious when made in a civil proceeding. Perjury, regardless of the setting, is a serious offense that results in incalculable harm to the functioning and integrity of the legal system as well as to private individuals. In the instant case, Holland's perjury wasted valuable and scarce public resources. His actions needlessly consumed court time, forced the federal Bureau of Investigation and the United States Attorney's office to engage in prolonged investigations, and attempted to prevent private citizens, the *Williams* plaintiffs, from satisfying their judgment.

In sum, Holland has failed to demonstrate that the circumstances surrounding his perjury convictions were atypical.[11/] Accordingly, we find that the Sentencing Commission considered and rejected a distinction based on the nature of the proceedings when arriving at the applicable guideline range for perjury, and that the district court erred in refusing to apply the guideline governing perjury cases.

III.

In summary, we VACATE Holland's sentence and REMAND with instructions that the district court eliminate the downward departure and engage in additional findings of fact as to whether the defendant's guideline sentence range should be enhanced to reflect Holland's leadership role in criminal activity that either involved five or more criminally responsible participants or, in the alternative, was "otherwise extensive" and involved at least one other participant.

IT IS SO ORDERED.

[11/] In fact, the text of the perjury guideline, section 2J1.3, reinforces the view that the Sentencing Commission considered and rejected, a base offense level distinction based on whether the perjury occurred in a civil or criminal proceeding. In section 2J1.3 (c) (1), the guideline cross-reference the accessory-after the fact guideline in cases where the perjury occurs in a criminal case. That the guideline differentiate between civil and criminal perjury in this limited respect lends credence to the view that the Commission adequately considered the notion of creating separate base offense levels for civil and criminal perjury.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

92-8596

DAVID WAYNE HOLLAND,
Appellant, Cross-Appellee

versus

UNITED STATES OF AMERICA,
Appellee, Cross-Appellant.

Appeal From The United States District Court
For the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND SUGGESTION OF REHEARING IN ANC

(Opinion May 24, 1994) 22 F.3d 1040).

August 9, 1994

Before

(X) The Petition(s) for Rehearing are DENIED and no active member of this panel nor other Judge in regular active service on the Court requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause in banc, and a majority of the judges in active service not having voted in favor of it, Rehearing In Banc is DENIED.

ENTERED FOR THE COURT:

/s/

Supreme Court, U.S.
FILED
DEC 23 1994
OFFICE OF THE CLERK

No. 94-451

In the Supreme Court of the United States

OCTOBER TERM, 1994

DAVID WAYNE HOLLAND, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

THOMAS M. GANNON
Attorney

Department of Justice
Washington, D.C. 20530
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QUESTIONS PRESENTED

1. Whether petitioner, who claimed to be a victim of selective prosecution, was improperly denied discovery of government documents.

2. Whether a district court may depart downward from the Sentencing Guidelines range applicable to a perjury offense because the perjury occurred in a civil proceeding.

3. Whether the district court committed plain error when it did not instruct the jury on the "two witness" rule in a prosecution for perjury under 18 U.S.C. 1621.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-451

DAVID WAYNE HOLLAND, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 17-32) is reported at 22 F.3d 1040.

JURISDICTION

The judgment of the court of appeals was entered on May 24, 1994. A petition for rehearing was denied on August 9, 1994. Pet. App. 33-34. The petition for a writ of certiorari was filed on September 12, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Georgia, petitioner was convicted of three counts of perjury, in violation of 18 U.S.C. 1621. The district court departed downward from the Sentencing Guidelines, sentenced petitioner to concurrent terms of two years' probation on each count of conviction, placed petitioner on home detention for six months, and ordered him to pay $761.50 in restitution. Gov't C.A. Br. 4. The court of appeals affirmed petitioner's convictions but, on the government's cross-appeal, vacated petitioner's sentence and remanded for resentencing. Pet. App. 17-32.

1. Petitioner was the founder and grand dragon of a group known as the Southern White Knights, Knights of the Ku Klux Klan (Southern KKK). In January 1987, he, members of the Southern KKK, and members of other Klan organizations disrupted a march held in Forsyth County, Georgia, in honor of the birthday of Martin Luther King, Jr. Because of that incident, a civil rights class action styled *Williams* v. *Southern White Knights, Knights of the Ku Klux Klan, Inc.*, No. 1:87-CV-565-CAM (N.D. Ga. 1987), was filed against petitioner and Southern KKK. Trial began in September 1988, and on October 5, 1988, the jury returned a verdict against petitioner in the amount of $450,000, based on a finding that petitioner and Southern KKK had conspired to deprive the plaintiffs of their civil rights, in violation of 42 U.S.C. 1985. Pet. App. 19 & n.3; Gov't C.A. Br. 4-5.

Petitioner appealed that judgment. On January 4, 1989, petitioner moved the district court for leave to prosecute his appeal *in forma pauperis*. In an affidavit accompanying the motion, petitioner stated that he did not "own any stocks, bonds, notes or automobiles, or

anything else that is of any value." Relying on the affidavit, the district court granted petitioner's motion. Pet. App. 19-20.

The attorney for the *Williams* plaintiffs, Morris Dees of the Southern Poverty Law Center (SPLC), retained another attorney, Brian Spears, to obtain satisfaction of the civil rights judgment from petitioner. In July 1989, in order to determine petitioner's financial status, Spears took petitioner's deposition. Dees had petitioner's deposition transcribed and presented it, with petitioner's *in forma pauperis* affidavit, to the United States Attorney for the Northern District of Georgia. Dees desired that petitioner be indicted for perjury. Pet. App. 20.

On March 15, 1990, a grand jury in the Northern District of Georgia indicted petitioner on five counts of perjury and one count of obstruction of justice. Counts 1 and 2, brought under 18 U.S.C. 1621(2), charged petitioner with making false statements about his assets in the *in forma pauperis* affidavit. Counts 3, 4, and 5, brought under 18 U.S.C. 1621(1), charged him with making similar false statements in the Spears deposition.[1] Count 6, brought under 18 U.S.C. 1503, charged petitioner with obstructing justice by encouraging a witness, Verla Mayo, to give false testimony before the grand jury investigating the case. Pet. App. 20. Count 6 was dismissed before trial, see *id.* at 21 n.5, and is not relevant to the issues presented in the petition.

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[1] The false statements charged in the indictment were that petitioner had earned no income in the preceding 12 months (Count 1), that he owned nothing of value (Count 2), that he had sold his boat (Count 3), that he had sold his car (Count 4), and that a $3,500 check he had written to Verla Mayo was a prepayment for services (Count 5). Pet. App. 20 n.4.

2. Before trial, petitioner moved to dismiss the indictment on the basis of selective prosecution. In connection with an evidentiary hearing on the motion, he subpoenaed documents and telephone records from the SPLC and its attorneys, the Department of Justice, the prosecutor, the Federal Bureau of Investigation's agent assigned to the case, and two telephone companies. See Gov't C.A. Br. 2. On July 18, 1991, after a hearing on motions to quash the subpoenas, a magistrate judge ordered the subpoenas for telephone records and SPLC documents quashed, but ordered the government to produce for *in camera* inspection any correspondence that had been exchanged between the Department of Justice and SPLC and its attorneys before the filing of the indictment against petitioner. C.A. Record Excerpts (R.E.) Tab 89, at 5, 7-9. On February 26, 1992, the district court denied petitioner's objections to the magistrate judge's order. R.E. Tab 108, at 4, 7.

3. At petitioner's trial the government established that, contrary to the statements petitioner made in his *in forma pauperis* affidavit and deposition, he owned substantial assets at the time he made those statements. The assets included a car, a boat, and a fence installation business. The government's proof also demonstrated that petitioner had testified falsely and had engaged in a series of sham transactions, in order to prevent the *Williams* plaintiffs from satisfying their judgment. Pet. App. 21.

The sham transactions included the transfer of a $3,500 check to Verla Mayo, in a purported prepayment for services, with instructions that she cash the check and return the proceeds to petitioner. Petitioner also entered into an elaborate scheme to conceal his ownership of a boat through a purported sale of the boat to one Edwin Pierce. The $1,000 used by Pierce in the

sham purchase was in fact provided by petitioner from the proceeds of the check cashed by Verla Mayo. Finally, John Avery Coor represented that he had purchased petitioner's business and automobile, when in fact petitioner continued to own and operate the business, and on two occasions after purportedly selling his car to Coor, tried to transfer the car to other persons. Pet. App. 21-22.

The government dismissed Count 1 of the indictment at the close of its case-in-chief. Petitioner presented witnesses who attempted to refute portions of the government's case. On March 13, 1992, the jury convicted petitioner on Counts 2, 3, and 5—relating, respectively, to petitioner's claims that he owned nothing of value, that he had sold his boat, and that he had prepaid certain services to Verla Mayo. The jury acquitted petitioner on Count 4 (relating to petitioner's claim that he had sold his car). Pet. App. 22.

After his trial, petitioner moved for a judgment of acquittal, contending, among other things, that the district court had erred by not instructing the jury on the "two witness" rule in perjury prosecutions. The district court rejected that claim on the ground that petitioner did not request such a charge. R.E. Tab 136, at 7, 9. The court later denied a motion for reconsideration of the same issue. 6 R. 138.

4. In the presentence investigation report, the probation officer recommended an adjusted offense level of 27 and a Criminal History Category of III. The adjusted offense level resulted from a base offense level for perjury of 12, an eight-level increase under Guidelines § 2J1.3(b)(1) for threatening physical injury to Verla

Mayo's son in an effort to induce her to testify falsely,[2] a three-level increase under Guidelines § 2J1.3(b)(2) for perjury resulting in "substantial interference with the administration of justice," and a four-level increase under Guidelines § 3B1.1(a) for his role as "an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive." The probation department accordingly determined that petitioner's Guidelines range was 87-108 months' imprisonment. Pet. App. 22-23.

At sentencing, the district court rejected each of the recommended upward adjustments. The court found that the four-level increase for petitioner's leadership role in the offense was unwarranted because petitioner "acted alone" in committing perjury. Pet. App. 24. In addition, the court concluded that Guidelines § 2J1.3 was not intended for cases in which the defendant commits perjury in a civil proceeding, and it departed downward by four levels on that ground to an offense level of eight. That level, coupled with petitioner's Criminal History Category of III, produced a Guidelines range of 6-12 months' imprisonment. The court then imposed a sentence of six months' home detention, two years' probation, and 250 hours of community service. Pet. App. 23-24.

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[2] After petitioner's indictment, when it became clear that Mayo had not supported his false version of events in her grand jury testimony, petitioner drove to Mayo's residence and began to drive up and down the street in front of the home. Mayo's young son was riding his bicycle in the street. When Mayo went outside to see what the car was doing, she observed petitioner driving the car. Once petitioner saw Mayo, he drove his car from one end of the street to the other at high speed towards Mayo's son, narrowly missing him. Gov't C.A. Br. 14.

5. The court of appeals affirmed petitioner's convictions summarily, Pet. App. 18-19 n.2,[3] but vacated his sentence and remanded for resentencing. *Id.* at 32. The court found (*id.* at 27) that the district court erred in rejecting the four-level enhancement for petitioner's role in the offense, because it did not consider the events surrounding petitioner's perjury, as required by the relevant conduct provisions of the Guidelines. See Guidelines § 1B1.3. The court noted (Pet. App. 27) that the trial evidence showed that as many as five persons had helped petitioner "by imparting an air of legitimacy * * * to his perjurious statements," and that if these persons had not been willing "to engage in sham transactions and the secreting of [petitioner's] assets," petitioner might never have committed perjury. The court further suggested (*id.* at 27-28) that regardless of whether five persons participated in petitioner's criminal activity, that activity might have been "otherwise extensive" under Guidelines § 3B1.1(a) because it "continued over a period of three years and involved the assistance of several individuals at least." Pet. App. 29. The court accordingly remanded for factual findings on those questions. *Ibid.*

The court of appeals also rejected (Pet. App. 29-32) the district court's conclusion that a downward departure was warranted because petitioner's perjury occurred during a civil proceeding. The court found (*id.* at 31) that

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[3] Petitioner had contended that the district court erred in denying his motion to dismiss the indictment for selective prosecution, in denying various discovery requests, and in failing to instruct the jury on the "two witness" rule in perjury prosecutions. Petitioner had also claimed that his false statements were not material, and that the evidence was insufficient to support his convictions. The court of appeals concluded that those claims were "meritless" and "warrant[ed] no discussion." Pet. App. 18 n.2.

neither petitioner's conduct nor the surrounding circumstances differed significantly from the conduct and circumstances to which the perjury statute normally applies. Noting that petitioner's perjury had "wasted valuable and scarce public resources," the court "categorically reject[ed] any suggestion, implicit or otherwise, that perjury is somehow less serious when made in a civil proceeding." *Ibid.* Accordingly, it held (*id.* at 32) that the district court erred when it refused to apply the perjury Guideline.

ARGUMENT

1. Petitioner contends (Pet. 9-16) that he was improperly denied discovery of government documents that would have supported his claim of selective prosecution.[4] The courts below correctly rejected that claim.

To succeed on a claim of selective prosecution a defendant must first show that he was singled out for prosecution although others similarly situated who committed the same acts have not been prosecuted. After satisfying that burden, the defendant must also demonstrate that his prosecution was constitutionally invidious; that is, motivated by constitutionally impermissible factors such as racial or religious discrimination or a desire to prevent the exercise of his

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[4] Although the first question presented in the petition is limited to government documents, see Pet. 8, the petition also discusses (Pet. 14-15) other categories of documents and records. Any claim relating to discovery of those additional documents is not fairly included within the question presented, and accordingly it is not properly before this Court. See Sup. Ct. R. 14.1(a); *Kaisha* v. *U.S. Philips Corp.*, 114 S. Ct. 425, 427-428 (1993) (per curiam). In any event, as we discuss below, there is no merit to any of petitioner's additional contentions.

constitutional rights. See *Wayte* v. *United States*, 470 U.S. 598, 607-610 & n.10 (1985); see also *Jones* v. *White*, 992 F.2d 1548, 1571-1572 (11th Cir.), cert. denied, 114 S. Ct. 448 (1993); *United States* v. *Johnson*, 577 F.2d 1304, 1308 (5th Cir. 1978); *United States* v. *Berrios*, 501 F.2d 1207, 1211 (2d Cir. 1974). The district court concluded that petitioner had satisfied the first prong of that test, see R.E. Tab 104, at 6-7, because the court could not find "other prosecutions for perjury arising in civil proceedings in this district in the recent past." The court, however, found (*id.* at 22, 25) that petitioner had failed to show that his prosecution was motivated by the constitutionally impermissible purpose of deterring his exercise of his right to free speech.

Petitioner argues that he was prevented from showing constitutional invidiousness by the district court's discovery rulings. That contention lacks merit. When a party attempts to subpoena documents or records before trial, that party must show that the items to be produced are (1) relevant, (2) admissible in evidence, and (3) specifically identified. See *United States* v. *Nixon*, 418 U.S. 683, 700 (1974). The requirement of specificity is intended to prevent "general fishing expedition[s]" for documentary evidence. *Ibid.* Petitioner was unable to make the requisite showings.

First, the courts below correctly rejected petitioner's request for telephone records. As the magistrate judge observed (R.E. Tab 89, at 5), the toll records sought by petitioner would not provide relevant evidence of a selective prosecution conspiracy against petitioner because the mere fact of conversations between SPLC and the Department of Justice would not show that those conversations were conspiratorial in nature. Cf. *United States* v. *Scarpa*, 897 F.2d 63, 70 (2d Cir.) (disclosure properly denied where evidence sought irrelevant to

issues in case), cert. denied, 498 U.S. 816 (1990). Moreover, because petitioner sought production of telephone records over a period of four years, see R.E. Tab 89, at 5, his request was overbroad, excessive, and unduly burdensome for the subpoenaed telephone companies. See *United States* v. *Nixon*, 418 U.S. at 698 (oppressive subpoenas may be quashed).

Petitioner's request for SPLC documents was properly rejected as well. In his district court filings, petitioner stated that "[t]hey did it to me, so I will do it to them," and that "[w]hat is good for the goose is good for the gander." See R.E. Tab 89, at 6. From those statements and the conceded animosity between petitioner and SPLC, the magistrate judge reasonably concluded (*id.* at 6-7) that petitioner was "engaging in an attempt at retribution" and "attempting to harass" SPLC and its attorneys by requiring them to produce evidence that would be neither relevant nor admissible in connection with his selective prosecution claim. See, *e.g.*, *Nixon*, 418 U.S. at 698; cf. *Scarpa*, 897 F.2d at 70.

The courts below likewise ruled correctly on petitioner's attempt to obtain government documents. Although the magistrate judge found that petitioner's discovery request was overbroad and sought many documents that were neither relevant to, nor admissible in evidence on, his selective prosecution claim, the magistrate judge did order the government to produce for *in camera* inspection "any documents or correspondence from or between Morris Dees, Brian Spears, Southern Poverty Law Center, AUSA Schroeder, Agent Halle and the United States Justice Department" related to petitioner's indictment and dated before the return of the indictment. R.E. Tab 89, at 8. The provision for *in camera* inspection was appropriate because, as the district court pointed out (R.E. Tab 108, at 4), the

"documents at issue relate[d] directly to a government investigation." See Fed. R. Crim. P. 16(a)(2); *United States* v. *Koskerides*, 877 F.2d 1129, 1133-1134 (2d Cir. 1989) (internal government documents generally exempt from discovery; trial court's decision on discoverability of documents, after *in camera* inspection, not reversible on appeal absent clear showing of abuse of discretion); *United States* v. *Johnson*, 577 F.2d at 1309-1310 (same).[5]

Petitioner errs when he suggests (Pet. 9-11) that review is warranted because the courts of appeals are in conflict over the preliminary showing that a defendant claiming selective prosecution must make to obtain discovery of government documents. While the courts of appeals may differ in their verbal formulations of that test, see, *e.g.*, *United States* v. *Fares*, 978 F.2d 52, 59 (2d Cir. 1992) (some evidence of elements of selective prosecution required); *United States* v. *Greenwood*, 796 F.2d 49, 52 (4th Cir. 1986) (nonfrivolous showing of both elements of selective prosecution test required); *United States* v. *Kerley*, 787 F.2d 1147, 1150 (7th Cir. 1986) (colorable basis for selective prosecution claim required), the common thread running through the cases is the requirement that a defendant must do more than simply allege that both elements of the selective prosecution test are present before discovery will be ordered. See, *e.g.*, *United States* v. *Fares*, 978 F.2d at 59 (mere assertions and generalized proffer on information and belief insufficient to warrant discovery). In the present

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[5] The government conceded that it had been in contact with SPLC before the filing of the indictment and that it had received documents from SPLC. See R.E. Tab 108, at 3. As the district court noted in overruling petitioner's objections to the magistrate judge's rulings (*id.* at 2), at the evidentiary hearing petitioner had an opportunity to engage in thorough cross-examination of Dees and the prosecutor on the nature of their contacts.

case, petitioner alleged, but could not show, even after *in camera* production of pertinent government documents and thorough cross-examination of attorneys for SPLC and the government, that his prosecution was based on a constitutionally invidious motive. See Gov't C.A. Br. 26-29. There is no reason to believe that any other court of appeals would have decided the discovery issues in this case differently from the Eleventh Circuit.[6]

2. Petitioner also contends (Pet. 16-26) that the court of appeals erred in reversing the district court's decision to depart downward. While petitioner claims that the court of appeals should have deferred to the district court's finding that his case was unusual, the court of appeals correctly recognized (Pet. App. 29-30) that whether a factor was adequately considered by the Sentencing Commission in formulating the Guidelines is a question of law that is reviewed *de novo*, not a question of fact to which the clearly erroneous rule applies. Cf. *Williams* v. *United States*, 112 S. Ct. 1112, 1119 & n.2 (1992) (court must examine the Guidelines, policy statements, and commentary in determining whether factor was adequately considered; departure on basis of factor fully considered by the Commission is incorrect

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[6] Petitioner errs when, in support of his claim that he was improperly denied discovery, he suggests (Pet. 13-14) that the government transmitted a copy of the indictment to another party a day before the grand jury voted on the indictment. The evidence at the hearings on the motions to quash petitioner's subpoenas showed that the March 15, 1990, date on the facsimile transmission in question was incorrect; the transmission contained an indictment count that was not composed until March 16, 1990. See Gov't C.A. Br. 27-28. Moreover, as the district court noted (R.E. Tab 108, at 2), even if the government did transmit the indictment to SPLC, that fact would not establish that the government acted from an invidious motive.

application of Guidelines). The court of appeals correctly held that neither petitioner's conduct nor the circumstances of his offense were atypical or significantly different from the conduct to which the perjury statute ordinarily applies, and thus that those circumstances were adequately considered by the Sentencing Commission. Even if the court of appeals had incorrectly assessed the Commission's intent, however, that would not warrant this Court's review. See *Braxton* v. *United States*, 500 U.S. 344, 347-348 (1991).

3. Petitioner contends (Pet. 26-30) that the district court erred by not charging the jury on the "two witness" rule that applies to perjury prosecutions under 18 U.S.C. 1621. That claim does not warrant review.

The "two witness" rule is based on "the notion that a conviction for perjury ought not to rest entirely upon 'an oath against an oath,'" because "equally honest witnesses may well have differing recollections of the same event." *Weiler* v. *United States*, 323 U.S. 606, 609 (1945). The rule therefore "requires that the alleged perjurious statement be established either by the testimony of two independent witnesses or by one witness and corroborating evidence that is inconsistent with the innocence of the defendant." *United States* v. *Chestman*, 903 F.2d 75, 81 (2d Cir. 1990) (internal quotation marks and brackets omitted), rev'd en banc on other grounds, 947 F.2d 551 (1991), cert. denied, 112 S. Ct. 1759 (1992); see also *United States* v. *Diggs*, 560 F.2d 266, 270 (7th Cir.) (rule satisfied by testimony of one witness plus "independent evidence so corroborative of the direct testimony that the two when considered together are sufficient to establish the falsity of the accused's statements * * * beyond a reasonable doubt"), cert. denied, 434 U.S. 925 (1977). A court must instruct on that

theory "when properly requested." *Weiler* v. *United States*, 323 U.S. at 611; see also Fed. R. Crim. P. 30.

Petitioner concedes (Pet. 27, 29) that he never requested that the jury be instructed on the two-witness rule. Petitioner's claim therefore must be reviewed under the "plain error" standard. See *United States* v. *Olano*, 113 S. Ct. 1770 (1993); Fed. R. Crim. P. 52(b).[7] Under that standard, petitioner must carry the burden of demonstrating that the court's failure to give the "two witness" charge actually prejudiced him. *United States* v. *Olano*, 113 S. Ct. at 1778. Petitioner has not even attempted to carry that burden. He merely cites this Court's decision in *Weiler*, *supra*, for the proposition that a failure to give the charge is not a "technical" error. Pet. 28-29. In *Weiler*, however, the "two witness" charge was specifically requested, 323 U.S. at 607-608, and the Court emphasized that whether a defendant is prejudiced by a failure to give that charge turns on the specific facts of each case. *Id.* at 611 (distinguishing *Goins* v. *United States*, 306 U.S. 622 (1939), where the Court concluded that failure to give the charge "could not have prejudiced the petitioner"). Petitioner cannot demonstrate prejudice, because the government presented at least two witnesses, or one witness with other corroborating evidence, to establish petitioner's guilt on each of the separate perjury counts. See Gov't C.A. Br. 43-47 (reviewing evidence on Counts 2, 3, and 5); *United States* v. *Chaplin*, 25 F.3d 1373, 1382 n.10 (7th Cir. 1994)

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[7] Petitioner suggests (Pet. 27-28) that his failure to object to the charge should be excused, because the district court had already indicated a disagreement with the applicability of the "two witness" rule in federal court. As the district court noted, however, petitioner did not make his position clear, and a properly framed request for a two-witness instruction would not have been "unavailing." 6 R. 138, at 3-4.

(no plain error in failure to give "two witness" instruction where prosecution introduced sufficient evidence to satisfy rule and it was thus improbable that outcome of case would have been different if instruction had been given).[8]

Petitioner also claims (Pet. 29-30) that the district court erred in not instructing the jury on the two-witness rule, because that was his "theory of the * * * defense." Even when a defendant requests an instruction as his theory of the defense, however, failure to give that instruction is not reversible error unless the defendant demonstrates that the absence of the instruction seriously impaired his ability to present an effective defense. See *United States* v. *Banks*, 988 F.2d 1106, 1109 (11th Cir. 1993); *United States* v. *Wood*, 982 F.2d 1, 3 (1st Cir. 1992); *United States* v. *Neal*, 951 F.2d 630, 633 (5th Cir. 1992). Petitioner cannot make that showing. He presented a vigorous defense in which he contended, among other things, that the $3,500 check to Verla Mayo was a prepayment for work performed, that he legitimately sold his car and boat to Coor before the civil trial, and that Coor took over his business. He presented, along with the testimony of the persons involved in these transactions, other witnesses to support his version of events. He sought to impeach

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[8] Petitioner's reliance on *United States* v. *Chaplin*, *supra*, is misplaced. Although the court in *Chaplin* reversed a conviction because the government's proof on one count of the indictment did not satisfy the "two witness" rule, 25 F.3d at 1380-1381, the court specifically declined to find plain error in the district court's failure to give a "two witness" rule instruction on another count. Because there was sufficient evidence to satisfy the rule—which is the case here as well—the court concluded that it was improbable that the outcome of the case would have been different if the instruction had been given. *Id.* at 1382 n.10.

Verla Mayo's testimony by presenting a witness who testified to an alleged prior inconsistent statement by Mayo. And he forcefully argued to the jury that the statements at issue in the indictment were true and that the government had presented insufficient evidence to the contrary. See Gov't C.A. Br. 41-42.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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